LeSaint Logistics, Inc. and CBS Personnel Services, LLC, an Ohio Limited Liability Company d/b/a Employee Management Services *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. Cases 9–CA–34431–1, –2

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The issues presented to the National Labor Relations Board are whether the judge correctly found that Respondent LeSaint Logistics, Inc., violated Section 8(a)(1) of the Act, by granting a wage increase to dissuade employees from supporting the Union, and violated Section 8(a)(3) and (1) of the Act by extending the probationary period of employee Charles Barrett and thereafter discharging Barrett and fellow employee Michael Barker because of their union activities.[1] The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order, as modified below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, LeSaint Logistics, Inc., Trenton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

''(a) Rescind and delete the unlawful rule that prohibits employees from discussing their wages with other employees from any copies of the employee manual which Respondent distributes to employees and distribute manuals so revised to incumbent employees, or make such revisions in the copies which they now possess.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you concerning your sympathies for or activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or the sympathies for or activities on behalf of the union of other employees.

WE WILL NOT threaten to close the plant if you select the Union as your collective-bargaining representative.

WE WILL NOT threaten you with a pay cut or loss of benefits if you select the Union as your collective-bargaining representative.

WE WILL NOT tell that it would be futile for you to select the Union as your collective-bargaining representative.

WE WILL NOT threaten you with unspecified reprisals because you support the Union or engage in activities on behalf of the Union.

WE WILL NOT threaten you with discharge if you select the Union as your collective-bargaining representative and go on strike.

WE WILL NOT threaten you with reprisals unless you provide us with the names of employees involved in the Union's organizing campaign nor will we promise you benefits if you do provide us with those names.

WE WILL NOT threaten you with bodily harm because we believe you are engaging in union activity.

WE WILL NOT threaten you that we will not reinstate discharged employees because they supported the Union.

WE WILL NOT maintain a rule that prohibits you from discussing wages with other employees.

[1] On June 18, 1997, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's finding that Respondent Employee Management Services (EMS) is not a joint employer of Respondent LeSaint Logistics, Inc. (LLI), and is not liable for any of the unfair labor practices committed by LLI.

[3] We shall modify the recommended order by adding a provision requiring LLI to rescind its unlawful rule prohibiting employees from discussing their wages.

WE WILL NOT grant you a wage increase in order to discourage you from supporting the Union or any other labor organization.

WE WILL NOT extend your probationary period, discharge or otherwise discriminate against any of you for supporting the Union or any other union.

WE WILL NOT in any manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind and delete our unlawful rule that prohibits you from discussing your wages with other employees from any copies of the employee manual we distribute to employees, and WE WILL also distribute the revised manuals to you or make such revisions in the copies which you now possess.

WE WILL rescind the probationary status of employee Charles R. Barrett and WE WILL, within 14 days from the date of the Board's Order, offer Charles Barrett and employee Michael Barker full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Barrett and Barker whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharges of Barrett and Barker and the extension of the probationary period of Barrett, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

LESAINT LOGISTICS, INC. AND CBS PERSONNEL SERVICES, LLC, AN OHIO LIMITED LIABILITY COMPANY D/B/A EMPLOYEE MANAGEMENT SERVICES

Engrid Emerson Vaughan, Esq., for the General Counsel.
Frank H. Stewart and *Lisa A. Huelsman, Esqs. (Taft, Stettinius & Hollister)*, of Cincinnati, Ohio, for Respondent LeSaint Logistics, Inc.
Franklin A. Klaine Jr., Esq. (Klaine, Wiley, Hoffman & Minutolo), of Cincinnati, Ohio, for Respondent CBS Personnel Services LLC, an Ohio Limited Liability Company d/b/a Employee Management Services.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on April 7 and 8, 1997. The charge in Case 9–CA–34431–1 was filed December 4,1996, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union) and an amended charge was filed by the Union on December 19,1996. The charge in Case 9–CA–34431–2 was filed by the Union on December 19, 1996.[1] The complaint was issued February 5, 1997. Respondent LeSaint Logistics, Inc.[2] (Respondent LLI) and Respondent CBS Personnel Services LLC, an Ohio Limited Liability Company d/b/a Employee Management Services (Respondent EMS) (jointly referred to as Respondents) filed timely answers which each respectively admitted the allegations in the complaint concerning the filing and service of the charges, jurisdiction, and agency status. At the hearing, Respondents further admitted the Union's labor organization status. Respondent LLI also amended its answer to admit the independent 8(a)(1) allegations in paragraph 7 of the complaint. After Respondent EMS continued to deny those allegations, the General Counsel determined that she would not independently litigate those allegations against Respondent EMS. Respondent EMS further admitted that it has been the assignee of and assumed the agreement between Robert Lee Brown d/b/a Employment Management Services, Inc. and Respondent LLI, and that it is properly named as a respondent in this proceeding.

The remaining issues to be resolved are whether Respondents are joint employers of certain employees, whether they violated Section 8(a)(1) by granting employees a wage increase and by maintaining an unlawful rule in a rule book; and whether they violated Section 8(a)(3) and (1) by extending the probationary period of and then discharging employee Charles Bartlett and by discharging employee Michael Barker.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent LLI, and Respondent EMS, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent LLI, a corporation, has been engaged in the operation of a warehouse in Trenton, Ohio, where it annually performs services valued in excess of $50,000 for Miller Brewing Company, an enterprise directly engaged in commerce. Respondent LLI admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent EMS, a limited liability company, has been engaged in the business of providing personnel services to various employers from its facility in Cincinnati, Ohio, where it annually provides services to employers outside the State of Ohio valued in excess of $50,000. Respondent EMS admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondents admit and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent LLI operates a warehouse in Trenton, Ohio where it provides services to Miller Brewing Company. Re-

[1] All dates are 1996 unless otherwise indicated.

[2] The name Respondent EMS has been corrected to reflect the facts as revealed in the hearing.

spondent LLI warehouses cans and bottles which it ships to Miller on a ''just in time'' basis. Its warehouse operations are highly integrated and synchronized with Miller. Respondent LLI does not have a written contract with Miller. Reynolds Aluminum and Owens Brockaway provide the cans and bottles that Respondent LLI ships to Miller. There is a certain amount of tension in Respondent LLI's business relationship with Reynolds and, especially, Owens since those businesses would prefer to deliver their products directly to Miller and eliminate the need to ship the products through Respondent LLI.

A good deal of paperwork is involved in Respondent LLI's operations, and its supervisors stress to employees the importance of accuracy in that paperwork. Respondent LLI distributes to its employees a two-page document called ''Miller Division Outbound Line Operator'' that sets forth the duties of the line operator, a classification of employees involved in this case. Those duties include being totally responsible for his or her line, for passing on and receiving all pertinent information about the line, and notifying the lead person or supervisor of any problem that could cause down time or slow the process.

Robert Mitts is vice president of operations for Respondent LLI. He is in charge of the overall operations of the facility. Delbert Murphy is distribution center manager for Respondent LLI; he reports to Mitts. Reporting to Murphy is James Gillespie, warehouse manager. Two supervisors report to Gillespie—John Newcomb and Clark Brown.

Respondent EMS provides personnel and payroll services to Respondent LLI for the employees in the warehouse as well as for many other businesses in the area.

B. *The 8(a)(1) Violations*

1. The admitted violations

Respondent LLI admits and I find that it violated Section 8(a)(1) of the Act by the following conduct at its Trenton, Ohio facility:

(a) Robert Mitts, vice president of operations for Respondent LLI

(1) Coercively interrogated employees concerning their sympathies for and activities on behalf of the Union, in about August 1996.

(2) Threatened employees that if they selected the Union as their representative, Respondent LLI would be forced to close its doors, in about August 1996.

(b) Delbert Murphy, distribution center manager for Respondent LLI

(1) Threatened employees with a pay cut if employees selected the Union as their collective-bargaining representative by telling employees that everything would go to ''ground zero'' and that they would lose their insurance and other benefits, in August 1996 and on numerous occasions thereafter.

(2) Implied to employees that it would be futile for them to select the Union as their collective-bargaining representative because Respondent LLI would not bargain with the Union or agree to anything in negotiations, in about August 1996 and on numerous occasions thereafter.

(3) Implied unspecified reprisals against an employee because that employee supported the Union and/or engaged in activity on behalf of the Union, on about September 12.

(4) Threatened unspecified reprisals against employees because the employees continued their support for and/or activities on behalf of the Union, on about October 30 during a shift change meeting.

(5) Implied to employees that it would be futile for them to select the Union as their collective-bargaining representative because the Union would not be able to do anything for them, on about October 17.

(6) Threatened employees that if they selected the Union as their collective-bargaining representative and the employees engaged in a strike, the employees would be fired, on about August 29 and October 31, during shift change meetings.

(7) Impliedly threatened an employee and/or promised a benefit by telling an employee that his job would still be available if he provided the names of the employees involved with the Union's organizational campaign, on about October 31.

(8) Coercively interrogated an employee concerning his and other employees' union activities and sympathies, on about November 2.

(9) Threatened bodily harm to an employee, in front of other employees, because Murphy believed that the employee was discussing the Union with other employees, on about November 7.

(10) Threatened an employee that there would be no reinstatement for any discharged employees because of the employees' support for and/or activities on behalf of the Union, on about November 7.

(11) Coercively interrogated an employee concerning his and other employees' union activities, on about November 20.

(c) Murphy and James Gillespie, warehouse manager for Respondent LLI, coercively interrogated an employee concerning his union activities, on about August 29.

2. The rule

Respondent LLI has distributed a rule book to employees that contains the following sentence: ''An employee's wage is confidential and *should not be discussed* with other employees. (Emphasis in the original.)

In its answer Respondent LLI asserts that effective January 7, 1997, the rule was rescinded. However, it did not present evidence to prove that assertion. There is no evidence that the rule was enforced in any specific manner against employees.

Section 7 of the Act guarantees employees the right to engaged in concerted activity for the purpose of mutual aid. It is essential for the full exercise of those rights that employees be able to discuss wages. *Noland Co.*, 269 NLRB 1082, 1088 (1984). The Board has held that a rule prohibiting employees from discussing wages violates Section 8(a)(1) of the Act. *Super One Foods*, 294 NLRB 462 (1989), enfd. in pertinent part 919 F.2d 359 (5th Cir. 1990). The fact that the rule has not been specifically enforced against employees does not negate the fact that its very existence in the rule book

distributed to and kept by employees has a tendency to stifle employees in the full exercise of their Section 7 rights.

I therefore conclude that Respondent LLI violated Section 8(a)(1) of the Act by maintaining the rule described above.

3. The wage increase

The General Counsel alleges that Respondents violated Section 8(a)(1) of the Act by granting a wage increase to employees on September 2, 1996. In late August Delbert Murphy had a conversation with Daniel Rupp. At this time, as more fully described below, Respondent LLI was fully aware of the fact that some of its employees were attempting to have the Union represent them. Rupp worked for Respondent LLI as a lift truck operator until he quit in December. Murphy asked Rupp what Rupp thought it would take to keep the Union out of the warehouse, and Rupp answered that he thought they needed to offer the employees more money. Murphy said that he did not have the power to do that himself, that he had to talk to Mitts. About 2 days later, on September 2, Respondent LLI distributed a memorandum to employees that advised them of new wage rates. Of about 30 employees, 11 received wage increases ranging from 25 cents to $1.50 per hour. Rupp received a wage increase of $1.50 per hour. After the wage increase Rupp had another conversation with Murphy. Murphy said that he thought they had a deal, referring to the wage increase. Rupp answered that he did not control the 30 people in the warehouse and that they had the right to make up their own minds, referring to union representation.

The practice concerning wages had been to give employees raises on the anniversary date of their employment with the Company assuming that their performance merited a raise. Also, employees received a raise when they assumed the duties of a more responsible job classification such as outbound line operator. Respondent LLI's managers had been concerned about the adequacy of the wages it was paying employees for several years, and they had likewise considered the need for a wage increase for employees, but Respondent LLI did not act on those concerns until after it learned of the union campaign among its employees.[3]

I conclude Respondent LLI violated Section 8(a)(1) of the Act by granting the wage increase. I note that the size of the increase was substantial and that it was given to a significant number of unit employees. The increase was given in the midst of the union organizing campaign and the timing was inconsistent with past practice. Indeed, Respondent LLI's agent, Murphy, directly linked the increase to the Union. Finally, Respondent LLI has presented no credible evidence to explain a lawful purpose for the increase. Under these circumstances, I conclude that the increase was unlawful. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

Respondent LLI cites *Reno Hilton*, 320 NLRB 197, 206 (1995), in support of its argument that the wage increase was lawful. However, that case is factually distinguishable inasmuch as there the employer had decided to grant wage increases before the union arrived on the scene. In this case, while Respondent LLI had been pondering such a decision before the union activities of its employees, I have found that no decision to increase wages had been made and that it was the arrival of the Union that jolted Respondent LLI into prompt action.

[3] I discredit the testimony of Mitts to the extent it attempts to show that the decision to grant the raises was made before Respondent LLI learned of the union activity among its employees. Among other things, this testimony is not corroborated by other agents of Respondent LLI who supposedly took part in the decision to grant the increase.

C. *The 8(a)(3) and (1) Violations*

1. Charles R. Barrett

The General Counsel contends that Respondents unlawfully extended the probationary period of, and then discharged, employee Barrett. Respondent contends that Barrett was a probationary employee who was discharged for work performance reasons.

Barrett began working for Respondent LLI on July 15. He was hired by Delbert Murphy, distribution center manager, and he was supervised by Murphy, John Newcomb, and Clark Brown. Barrett worked as a forklift driver and outbound line operator. On August 19, during his training period, Barrett used a forklift to move some pallets. Because he went into the pallets from the side, the blades of the forklift went through several inches too deep and pushed over another nearby stack of pallets. Between 15 to 29 cases of merchandise were ruined. Barrett was never told that this incident would be held against him.

Sometime before August 27 Barrett spoke with fellow employee and alleged discriminatee Michael Barker about the Union. Barker was handing out literature and talking to the employees about the Union. On about August 27 Barrett signed a card authorizing the Union to represent him. Barrett thereafter talked to other employees about the Union and assisted Barker in distributing union literature to the employees.

On about August 31 Barrett had a conversation with Robert Mitts, vice president of operations for Respondent LLI. Mitts approached Barrett on the work floor and asked Barrett his name and how Barrett was doing. After Barrett answered Mitts said that he was hearing rumors about the Union and that the Union was something that the employer did not want and that if the Union came in, the employer would close its doors. Mitts explained that with the Union, all wages and benefits would go to ''ground zero.'' Mitts then asked Barrett if Barrett had any activity in the Union, and Barrett said that he had. Mitts then asked if Barrett had signed a union card, and Barrett replied that he had not.[4] After this conversation with Mitts, Barrett, along with Barker, continued to discuss the Union with other employees.

On September 27, Barrett was asked by Newcomb, supervisor, to move a golf cart. As he was moving the golf cart Barrett pressed the gas instead of the break and he hit and damaged a wall and some nearby furniture. The damage to the wall was about 2 feet long and about 3 to 4 inches wide. Barrett reported this to Newcomb, who advised Barrett to discuss the matter with Murphy. The next morning, before work, Barrett reported the incident to Murphy; Murphy already knew about it. Barrett offered to fix the damage on his

[4] As noted above, Respondent LLI admitted the 8(a)(1) allegations of the complaint. The facts set forth above are based on the uncontested testimony of Barrett, who I find to be a credible witness.

own time and pay for the cost, but Murphy said not to worry about it, that it was no problem and there was nothing to be done. Murphy said that it gave his father, who works in the facility, something to do. Barrett filled out an incident report describing the accident. The wall damage had not been repaired when Barrett was fired on October 31.

On October 8 Barrett was asked to move two pallets of merchandise to the short dock area. Barrett moved the pallets as requested. When he returned to work several days later, he was told by employees that the pallets had fallen backwards onto other pallets and they had to be straightened out. No supervisor ever spoke to Barrett about this incident. However, Gillespie filled out an ''Incident Report'' in which he blamed Barrett for incorrectly stacking the pallets thereby causing an unsafe condition. When another employee attempted to rectify the problem, the pallets broke and the merchandise on the pallets was destroyed.

At some unspecified time Barrett was being trained to work on the can line. During that time Barrett was told that his work ''sucks'' and that he had to get ''[his] ass in gear.'' Barrett worked on the can line for about a month and this remark was made when his started that task. At that time Barrett was assigned to sweep the long halls, a task that he resented.

Barrett's probationary period was to end October 15. On October 16 Murphy approached Barrett and told Barrett that his probationary period was being extended. Barrett asked why, but Murphy walked away without giving a reason.

On October 18 Barrett was working with three more senior operators to get a trailer unloaded, the contents repaired and then reloaded. One of the senior operators left a pallet of merchandise in the repair area and thus this merchandise was not loaded on the truck by Barrett, although he should have discovered that the pallet was missing by examining the paperwork. Newcomb discovered the error and a pallet was added to the load. In an ''Incident Report'' signed Clark Brown, a supervisor, Barrett was faulted for incorrectly checking off the paper work involved with the shipment, incorrectly marking down the pallets put away and the quantity of merchandise at the location, failing to write the start time or his name and other errors. Barrett could not recall at the hearing whether he committed all those errors without examining the paperwork. Brown testified that the next day he showed Barrett the report; Barrett said that he had never been told how to properly fill out the paperwork. There is no evidence to contradict Barrett's explanation, nor is there evidence that the error was repeated after Barrett was instructed on how to properly complete the paperwork.

On October 24 Barrett discovered a Miller High Life tag on a pallet of Miller Genuine Draft beer. This mistake was made by the company that had earlier handled the product. Barrett reported this to Clark Brown, supervisor. Respondent LLI had been having a problem with the wrong product being scanned and Brown wondered whether this type of mistake was the cause. Barrett was given credit for catching the mistake.

On October 28 Barrett and another employee spent about 30 to 45 minutes in the parking lot at Respondent LLI's facility talking to employees about the Union. During this time Barrett helped obtain the signatures of about eight employees on union authorization cards. Barrett also signed another authorization card for the Union.[5] This activity was done openly in full view of anyone who cared to see it.

On October 30 Barrett loaded the wrong cans on a truck. He was told of the error by Gillespie, who sent two employees to help Barrett correct the problem. This took them about 10 to 15 minutes. Before Barrett loaded the cans on that occasion, another employee had incorrectly ''staged' the cans for loading and Clark Brown, supervisor, had mistakenly approved the load for shipping. Brown filled out an incident report that described the mistake. It concluded that Barrett ''needs to verify his load before shipping it.'' Brown also completed a report for the employee who incorrectly ''staged'' the cans for loading.

On October 31 Murphy conducted a shift change meeting of employees. During this meeting Murphy pointed to employee Barker and asked him if he knew what ''ground zero'' was; Barker replied that zero meant nothing. Murphy then pointed to employee Dan Rupp and asked the same question; Rupp shook his head no. Murphy explained that ''ground zero'' meant that the employees lost their benefits and wages went back to minimum wage. Murphy asked the group of employees if they wanted people like Rupp and Barker negotiating on their behalf with management. Murphy also said that he had enough personnel in management to run the facility.[6]

Barrett attended this meeting but he was called out before it ended by Gillespie, assistant warehouse manager. Gillespie asked Barrett to assist another employee in correcting a mistake the employee had made in loading the wrong cans. After Barrett did this he was summoned to Murphy's office, where Murphy and Gillespie were present. Murphy said that after reviewing Barrett's file he concluded that Barrett was performing substandard work and that he did not think Barrett was ''right'' for the job. Murphy made reference to the incident involving damage with the golf cart. Barrett asked to see his file, but Murphy refused. Murphy handed Barrett a document entitled ''Employee Warning Record.'' Barrett said ''okay'' and asked for his personal belongings, and Gillespie then left the room to get Barrett's personal belongings. While Murphy and Barrett were alone in the office Murphy said that if Barrett would tell him the names of the employees who were dealing with the Union, Barrett's job ''would still be there'' but if not Barrett ''was out of there.'' Barrett replied ''Fuck you'' and left.

The document handed to Barrett is dated October 31 and bears a heading ''warning.'' It indicates that the ''violation'' was on October 31 at 3 p.m. The ''nature of violation'' is described as ''substandard work,'' ''carelessness,'' and ''unsatisfactory performance during probationary period.'' Under the heading ''Company Remarks'' it reads that on October 15 Barrett's probationary period was extended until November 15 and that Barrett was advised at that time that he needed to improve in several areas of his performance and that his probationary status would be reviewed on November 15. It continues that since October 15 Barrett's performance has not improved and several incidents have occurred. The form

[5] The record is not clear how, if at all, this card was different from the card Barrett had signed earlier.

[6] These facts are based on the testimony of Rupp, who I find to be a credible witness. This testimony is generally corroborated by Barrett and Barker. I also note that Murphy did not testify at the hearing.

indicates that Barrett was given a first warning on October 15, but the spaces for indicating a second and third warning are blank. Finally, the form reads that Barrett ''is terminated for unsatisfactory performance during his probationary period.'' In the section providing for employee remarks Barrett wrote ''I feel that they never gave me enough time for training before they set me lose [sic] on my job. I feel that I am being discriminated [sic] because of my age.''[7] The form is signed by Barrett, Murphy, and Gillespie.

While employed, Barrett kept notes of information given during shift change meetings. These notes were kept by him on a clipboard and were considered part of his personal belongings. Among the notes on one sheet of paper Barrett wrote the following: ''fuck procedure.'' This was not discovered by Respondent LLI until after it had made the decision to discharge Barrett.

On November 7 Barrett returned to the facility to pick up his paycheck. He was wearing union buttons. Barrett spoke to an employee and went to Murphy's office, were Murphy seemed to have difficulty finding Barrett's check. Barrett had already spotted his check and pointed it out to Murphy, who then threw the check over to Barrett. Murphy said that he knew what Barrett was trying to do, that the Union would never work and that there never would be ''jobs reinstated.'' Barrett smiled and walked away. Later, Barrett was speaking to another employee while he was in his jeep about ready to leave. Murphy came out from a side door, throwing the door open, and ''kind of'' pushed the other employee out of the way and opened the door to Barrett's jeep. Murphy then told Barrett to get the hell off of his property or he was going to personally put Barrett off of the property and he was sick of Barrett talking about the Union. Barrett left.[8]

2. Michael A. Barker

The General Counsel contends that Respondents unlawfully discharged employee Barker. Beginning his employment with Respondent LLI on October 13, 1994, Barker worked as a line operator. He was one of the most senior employees.

On about July 23, Barker was supposed to work a 12-hour shift. He arrived at work early in anticipation of charging the battery of his car. When things did not work out as he had hoped, Barker walked to a nearby bar. Barker earlier had encountered another employee who was not scheduled to work, and Barker decided to let that employee work the 4 hours overtime that Barker had planned to work in addition to his 8-hour shift. Thus, Barker was at the bar drinking for about 4 hours. After Barker reported to work, he was asked to go to Murphy's office. Gillespie was present. Murphy asked if Barker had been drinking; Barker said that he had been. Murphy said that this was grounds for dismissal and Barker acknowledged that he knew that. Murphy told Barker to go home and come back the next day and they would talk about it. When Barker returned to work the next day he was suspended for an additional 5 days by Murphy. After serving the suspension Barker again met with Murphy and Gillespie. Barker was presented with an employee warning notice and he was asked to sign it. The warning notice recited that Barker had reported to work under the influence of alcohol, in violation of the employee rulebook. It emphasized that this was a very serious violation and such behavior would not be tolerated. It further provided that Barker had to actively participate in an alcohol rehabilitation program in order to continue to work at Respondent LLI. It ended ''Any future reoccurrence will result in termination. This warning will remain on [Barker's] record for 120 days.'' Barker signed the warning notice. Afterwards, Barker called several alcohol abuse treatment programs. None were able to accept the insurance that he had at the time. Barker, however, did attend three AA meetings. Barker told Murphy the problems he was having getting into a formal treatment program, but that he was able to attend AA meetings. Murphy asked Barker what he thought of the meetings and other general questions. Nothing more was said of the matter until after the Union campaign began, as described below.

The day after the drinking incident Barker's wife called Murphy. She told Murphy that none of the nearby alcohol counseling facilities accepted their insurance and she was trying to find one in Dayton. After several calls back and forth that day, Murphy restated that Barker had to get some alcohol abuse counseling. Barker's wife asked about AA meetings, and Murphy asked if that was good enough for her. Barker's wife asked what he meant, and Murphy asked if she did not think her husband had an alcohol problem. Barker's wife said no, that she did not think he had one. They talked about AA meetings; Mrs. Barker explained that she was familiar with them because she had worked for a drug counseling agency. Murphy said that if that was good enough for her, it was good enough for him.[9]

In late August Barker had a conversation with employee Pottorf about the Union. Pottorf inquired if Barker would be willing to assist in determining whether the employees would be interested in a union. On about August 27 Barker began actively talking to other employees about the Union during lunchtime and off-duty time. He solicited employees to sign authorization cards for the Union.

On August 29 Barker was summoned to Murphy's office. There, with Gilllespie also present, Murphy said that he had heard a rumor that Barker had been distributing union literature out of his car; Murphy asked if that was true. Barker said yes. Murphy replied that for all the things that the Company had done for him, he could not believe Barker would do that to the Company. At this time Murphy had Barker's personnel file on his desk and on the top was a copy of the incident report concerning the alcohol incident described above. Murphy asked if Barker had an alcohol problem and Barker answered no, he did not. Murphy then said that Barker should not worry about it.

[7] Barrett explained that he felt he had been assigned tasks such as sweeping and cleaning up outside and that led him to include this assertion.

[8] I base these facts on the testimony of Barrett. I have considered the testimony of employee Betty Renner concerning this matter, but I conclude that her testimony is not credible. She impressed me as someone too eager to please her employer with testimony helpful to it, and her testimony appeared exaggerated. I again note that Respondent LLI declined to call Murphy as a witness. I infer that Murphy's testimony would not have corroborated Renner's testimony.

[9] I specifically do not credit the conclusory testimony of Gillespie that Barker had not started any alcohol treatment program at the time he was discharged. I conclude that Respondent LLI knew the extent of Barker's efforts in this regard and those efforts were satisfactory, at least until Barker became involved with the Union..

A day or two later Mitts was walking through the warehouse talking to employees individually. Mitts approached Barker and asked him what he thought about the Company, whether the benefits were good. Barker said that he thought that the benefits were really good. Mitts said that he understood that Barker was for the UAW and that he was leafleting. Barker told him yes.

On October 23 Barker was working on unloading a series of trailers of bottles of Miller's Genuine Draft so that he could examine and verify the contents and then immediately reload the merchandise on a trailer for shipment to the brewery. This is considered a ''cross dock'' and is billed differently by Respondent LLI than regular warehoused merchandise. These loads are shipped in a set sequence so that the bottles can be traced at every step of the shipment process. It was near the end of the shift and Barker ''got in a hurry'' and did not pay attention to what he was doing and he unloaded one trailer out of sequence, and then reloaded it, again out of sequence. In a situation like that, if the error is caught soon enough it can be corrected at the facility by computer entries. If not, it is necessary to contact the glass manufacturer and correct the mistake through them. This, understandably, is frowned upon by Respondent LLI. Barker did not notify his supervisor of the error; he felt that he could handle the matter himself. Instead, he notified the employee who was going to take over his shift of the problem. Barker also forgot that he had the paperwork pertaining to the error and he put it in his locker instead of turning it in to the shipping clerk. The first thing the next day Barker was asked for the paperwork. Barker said that he thought he had turned it in. Later, Barker discovered that it was in his locker and he then turned it in. He was told by the shipping clerk that the mistake caused four loads to be shipped incorrectly to the brewery. Barker was then told by Murphy to complete an incident report. In that report Barker acknowledged his mistake and admitted that he did not inform a supervisor because he felt he could correct the problem. He indicated that he advised the employee on the next shift of the problem. He further acknowledged that he forget to turn in the paperwork. Clark Brown also completed an incident report where he described Barker's error as follows: ''[Barker] unloaded and shipped the wrong cross dock pallets. . . . He realized his mistake and tried to correct it by shipping the wrong cross dock load on the next release to cover his mistake. He ran out of time before he could do this. He did not talk to anyone of this problem except [his replacement] at shift change. [Barker] should have asked for help as soon as he realized that he had made a mistake.'' A third incident report was completed by Supervisor John Newcomb. This last report also described the error, but in more technical detail.

Barker had made such mistakes in the past, and, with the help of a supervisor, they were corrected. On other occasions Barker had been able to handle the matter by himself and the supervisor became aware only generally of the problem after the fact. He was told by supervisors when he made the mistakes that he should pay attention to what he was doing.

On October 28 Barker attended an organizing meeting at a hotel, where he signed an authorization card. At that point Barker became one of the three most active employee union organizers; he was elected to solicit employees on the first shift. Thereafter Barker talked to employees about the Union at the picnic table located about 20 to 30 feet in front of the facility.

I have already set forth above the facts concerning the shift change meeting on October 31 where Murphy specifically questioned Barker about the meaning of ''ground zero.'' On November 2 employee Rupp was called into Murphy's office. Murphy asked Rupp who had the union cards. Rupp replied by asking whether Barker openly admitted that he, Barker, had the cards. Murphy said yes. Rupp said that employee Pottorf openly admitted that he had cards, and he was fired. Murphy again said yes. Rupp then asked why Murphy was asking him who had the cards.

Barker was fired on November 1. He was called into Murphy's office; again Gillespie was present. Murphy said that Barker was being fired because of the alcohol incident and the mishandling of the cross dock. He was handed a written notice of termination dated November 1 and signed by Gillespie, Murphy, and Respondent EMS Human Resources Manager Judi Clark. The notice states that the discharge was due to the following: ''At approximately 9:20 PM on October 23, 1996, you knowingly unloaded and shipped the wrong crossdock trailer. You intentionally failed to inform a supervisor of your error, instead attempting to cover-up your mistake. You also failed to file an incident report as required immediately upon error in shipment. You only completed a report upon discovery by your supervisor.''[10] Barker refused to sign the termination notice.

Also appearing in Barker's personnel file is a document entitled ''Employee Warning Record'' that is dated November 1 and signed by Gillespie. It contains language similar to that in the termination notice described above, except that it also describes Barker's conduct as ''insubordination.'' It indicates that the date the warning was given was November 1. Barker never saw this document nor was he ever ''warned'' about the error; instead he was fired.

After the discharge there were problems with Barker's paycheck, and Barker's wife had a number of conversations with Murphy concerning that matter. During one such conversation Barker's wife explained that they really needed the money. Murphy said ''isn't [Barker] working for the Union.'' Barker's wife said that he was not. Thereafter Barker's wife had a conversation with Mitts about 401(k) money. Mitts asked if Barker was working and Mrs. Barker said yes. Mitts asked if the employer was union, and Mrs. Barker answered that she did not know.[11]

3. The past practice

Considerable documentary and other evidence was submitted at the hearing concerning Respondent LLI's practice regarding employee discipline and discharge. During the time he was employed, Barrett heard Murphy discuss how another employee had run some equipment through the back wall of the facility into the nearby grassy area; Murphy was laughing

[10] Gillespie testified that he felt Barker had been deliberately concealing information about the error he made. I discredit that and other testimony to that effect. I note that the earlier reports by the supervisors more immediately involved in the incident contained no hint of any deliberate concealment by Barker. I conclude that this was a justification fabricated by Respondent LLI to attempt to justify its discharge of Barker.

[11] This is based on the unrebutted testimony of Barker's wife, who I find is a credible witness.

about it. Murphy also discussed how that same employee had hit a steel beam in the plant and had bent it. That employee was not discharged. Also, at least two or three times a week, Barrett witnessed other employees make work errors such as loading the wrong product, loading or unloading the wrong trailer, or breaking glass bottles. These employees too were not discharged. Likewise Rupp witnessed an employee mistakenly load 20 pallets of beer cans. Two employees were summoned to help unload the trailer and correct the mistake. That employee was not fired. Rupp admitted that he also had mistakenly loaded and unloaded product. Although a supervisor was aware of these errors, he was not disciplined.

Documentary evidence shows that employee Martin, who has greater seniority than either Barrett or Barker, has a history of repeated work mistakes. On June 19, 1995, Martin was issued a verbal warning when he wedged a forklift blade under a piece of angle iron and caused extensive damage to the forklift. The next day Martin was issued another verbal warning for loading the wrong cans. On July 8, 1995, Martin was issued a written warning for failing to follow instructions resulting in damage. On November 2, 1995, Martin received a verbal warning for bumping a forklift and causing part of the contents of a pallet to fall to the floor. On December 19, 1995, Martin improperly loaded a ''cross dock.'' On January 5 Martin's forklift got caught in a pallet causing the contents of one pallet to fall to the ground. Martin agreed to undergo a 4-hour unpaid retraining program. On January 8 Martin failed to report to work due to a snowstorm. Since many other employees were able to report to work, Martin was advised that he was expected to report to work when scheduled. On March 13 Martin shipped the wrong quantities of product to Miller and failed to have a supervisor check and approve the shipment. He was suspended for 3 days and agreed to undergo another unpaid, voluntary retraining program. Further, Martin was ''bumped'' into another job classification. On October 30 Martin set down the wrong cans for loading. That day Martin was replaced by Barrett, and Martin provided Barrett with incorrect information regarding the work to be performed. There is no evidence that Martin was disciplined for this incident alone. On December 6 Martin entered the wrong numbers on a shipment, causing a delay in the shipment. On December 12 Martin was issued a written warning because he had several reports of carelessness and negligence over the last 60 days. Finally, on March 10, 1997, Martin again entered the wrong information concerning a shipment.

Employee Jeff Reuthe began work with Respondent LLI on July 8, 1995. Documents in his file reveal that on October 19, 1995, he hit and damaged a door with his forklift. The next day bottles were broken when Martin did not have his forklift centered under the pallets he was moving and they fell. On October 23, 1995, Reuthe was issued a verbal warning for these two accidents. On October 27, 1995, he was issued a written warning because he had damaged merchandise the day before. The written warning indicates that it will remain part of his record for 120 days, and that having two open warning letters at one time will result in termination. On February 8 Reuthe failed to return a ''bay card'' to its proper location. For this he was issued a warning for failure to follow instructions and unsatisfactory work performance. However, despite the fact that this constituted the second warning within the 120-day period, Reuthe was not discharged; instead he was permitted to agree to the voluntary retraining program. On March 28 Reuthe received another written warning for failing to accurately record correct amounts of damaged product. On August 16 Reuthe received a written warning for failure to report to work. On October 17 he received another written warning for insubordination. This was because he unloaded a trailer without having the proper paperwork despite being told by his supervisor on ''numerous occasions'' that this was improper. On November 21 Reuthe put damaged product into stock. He was advised by his supervisor that this was improper and was his responsibility. On December 18 Reuthe omitted to place the ''load locks'' on a trailer; another employee discovered the error and corrected the situation. On December 20 Gillespie received a call from ''Mel'' who was very upset with the fact that a trailer was not loaded in proper sequence. This caused her 30 minutes down time. She told Gillespie that she was going to charge Respondent LLI for the time and formally write up the incident. Reuthe was responsible for the error: when Gillespie inspected the remaining palletts from this load he noted that Reuthe did not properly handle those either. On January 14, 1997, Reuthe unloaded the wrong product. On January 16, 1997, Reuthe was issued another written warning for the previous errors he had made. This time the warning stated that any other violation within a 120-day period would result in a 1 week disciplinary layoff. On February 6, 1997, Reuthe ''mixed good products with bad.'' The next day he again failed to put load locks on a trailer. The day following that he failed to correctly fill out paperwork. There is no indication that he was disciplined in any way for these incidents.

Ed Keating began work for Respondent LLI on August 1, 1994. Thus he too is more senior than both Barker and Barrett. On July 28, 1995, Keating was given a verbal warning for destroying four pallets of product and severely damaging four other pallets of product by carelessly using his forklift. On August 29, 1995, he was issued a written warning for loading only 12 pallets when the order called for 20 pallets to be loaded; Keating turned in paperwork showing that he had loaded the 20 pallets. On November 2, 1995, Keating received another written warning, this time for an accident due to negligence resulting in damage to product. On April 1 Keating received a written warning for another accident due to negligence. On June 25 Keating acknowledged that 4 days earlier he had used inappropriate language to a representative of another employer. There is a memo in Keating's file dated June 27 from Gillespie entitled ''Issues with Ed Keating.'' It indicates that Keating does not show good judgment in crisis situations, that he did not volunteer to serve on a certain committee, that he does not sound the horn on his forklift in certain situations, that employees had complained about his attitude, that he displays anger rather than concern about job problems and that he displays resentment rather than appreciation regarding work-related situations. There are also notes apparently prepared by Murphy dated July 1 that list Keating's pros and cons. The cons include a negative attitude, not working well with others, not trying to work out problems, not accepting responsibility for his mistakes, having a negative attitude towards customers and not wanting to communicate with coworkers, that ''employees complain that Ed constantly pushes union on them, and that things would be better if there was a union in the warehouse,'' that when

Keating is advised of these problems he stays to himself for a while and then goes back to his old habits. The pros included good attendance, he keeps his line running although he paces himself, he sends quality loads, and does work overtime. The discipline of Keating appears to increase thereafter, and on March 25, 1997, Respondent LLI sent part of his file to Karen Donahue of Respondent EMS for review.

Employee Bill Hollon began work for Respondent LLI on December 14, 1993. He is one of the most senior employees. On November 2, 1995, Hollon received a verbal warning for careless and inefficient performance. On November 26, 1995, Hollon and another employee stored material that was wet, thereby failing to properly inspect the material. On January 2 Hollon sent a load to the brewery that was missing one case. On February 16 Hollon received a verbal warning for shipping damaged merchandise. On February 24 Hollon ran into and damaged a beam with his forklift. On March 5 he failed to properly turn in some paperwork, and the next day he put away pallets that were damaged. That day Hollon agreed to undergo voluntary, unpaid retraining. Two days later Hollon received a verbal warning for preparing a load for shipment which contained damaged merchandise. On August 8 trailer doors were damaged as a result of material which fell against them because Hollon had not properly stacked the material. On October 12, after Barrett had improperly stacked some product, as described more fully above, Hollon was asked to remove the product. Instead of attempting to remove one pallet at a time, Hollon attempted to remove both pallets at once. The pallets broke causing damage to the product. On October 10 Hollon loaded damaged product, thereby failing to adequately inspect the product first. He received a written warning for that error. On March 6, 1997, he damaged approximately 12 boxes of merchandise.

Employee Mike Henry began work for Respondent LLI on July 15, the same date Barrett was hired. A note in his file from Gillespie indicates that on August 20 Henry's probationary period was extended to November 15 because his progress and speed were not satisfactory. On September 6 Henry damaged a trailer door with the forklift he was driving. On September 17 Henry damaged merchandise while operating his forklift. Henry was not disciplined or discharged for these mishaps during his extended probationary period and he continued to be employed by Respondent LLI at the time of the hearing.

Employee Mike Goodwin began work for Respondent LLI on January 21, 1995. On August 24, 1995, he received a verbal warning for not appearing for work on August 21. On February 28 he spilled some merchandise. On March 12 he dropped some cans from a pallet. For this he received a written warning. On April 16 Goodwin received another written warning, this time for reporting to work out of uniform. On May 15 Goodwin loaded a pallet of merchandise that was soiled. On January 9, 1997, Goodwin was involved on a can spill with his forklift.

Employee Bart Bowling began work for Respondent LLI on August 2, 1994. On March 27, 1995, he received a written warning for backing his forklift through the aisle wall. On July 7, 1995 Bowling received a verbal warning for breaking glass bottles. The documentation of the verbal warning indicates that Bowling had other accidents in the past which caused extensive damage to the warehouse and he had not been given verbal warnings for those accidents. On August 18, 1995, Bowling received a written warning for raising the forks of his forklift approximately 14 feet and thereby putting 2 holes and some dents in the roof of a trailer. On February 9 Bowling received a verbal warning for not attending a shift change meeting. On February 20 Bowling staged the wrong item for loading. On March 6 he loaded the wrong items on a trailer, those items were improperly loaded and contained damaged merchandise. On July 1 Bowling improperly loaded a shipment of merchandise. On August 5 Bowling was in the process of loading the wrong merchandise. This apparently was part of a chain of events that led to the shut down of one of the line operations. Bowling received a written warning for his role in this matter. On August 20 Bowling damaged a trailer doorway.

Turning specifically to the matter of probationary employees, during 1996, five employees, including Barrett, had their probationary period extended. Of these, two employees quit, two remained working, and one employee Barrett was discharged. In addition, six employees were fired in 1996 during their initial probationary period.

The foregoing evidence shows that Respondent LLI does not have a firm, regularly followed disciplinary system. Instead, some employee errors are simply noted, others may become subject of a verbal warning and others may result in written warnings. The length of time the warnings remain open varies. Even serious and repeated errors are dealt with by the voluntary retraining program rather than discharge.

4. Analysis of the discharges

a. *The legal standard*

The analysis set forth in *Wright Line*[12] governs the determination of whether Respondents violated Section 8(a)(3) and (1) as alleged. The Board has restated that analysis as follows:

> Under *Wright Line*, General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.[7] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9]

[7] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

[8] See *GSX Corp. v. NLRB*, 918 F. 2d 1351, 1357 (8th Cir. 1990). (''By assessing a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an

[12] 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

employer can establish an affirmative defense to the discrimination charge.'')

[9] See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

T & J Trucking Co., 316 NLRB 771 (1995). This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

b. *Barrett's case*

I examine the evidence to determine whether the General Counsel has sustained his burden concerning the allegations that Respondent LLI discriminatorily extended the probationary period of, and then discharged, Barrett. I have found above that Barrett engaged in union activity in the period of time immediately preceding the alleged unlawful conduct. These activities included discussing the Union with other employees, passing out union literature and signing an authorization card. I have concluded that Respondent LLI was well aware of the union activities of its employees in general, as witnessed by its aggressive antiunion campaign. There is extensive evidence of animus, as set forth above in the admitted findings of 8(a)(1) conduct. Barrett himself was the subject of some of this unlawful conduct. He was unlawfully threatened and interrogated by Mitts, the highest ranking official at the facility. Barrett further admitted to Mitts that he had engaged activity in support of the Union. Although Barrett denied signing a union card when asked whether he had done so by Mitts, it is significant that Barrett continued with his union activities even after this incident with Mitts. Respondent LLI's pattern of unlawful conduct directed against Barrett continued even after Barrett was fired, thus revealing not only continuing knowledge of those activities but also the depth of the hostility towards those activities. In sum, the evidence clearly shows that the General Counsel has established the elements of union activity, general and specific knowledge by Respondent LLI of those activities, extensive animus directed both at Barrett specifically as well as other employees. The element of timing further supports the General Counsel's case, in that the alleged unlawful conduct occurred in the midst of a union campaign, close in time to the union activity and in the midst of Respondent LLI's pattern of unlawful conduct. In addition, I note that at his discharge meeting, Murphy offered Barrett the chance to avoid discharge if he would reveal the names of the employees supporting the Union. This is direct evidence of the unlawful motive for the discharge. In sum, the General Counsel has established a strong case in support of the complaint allegations.

I turn now to whether Respondent LLI has met its burden to show that the conduct would have occurred in the absence of union activity. First, as to the extension of the probationary period, I have concluded that no reason was given to Barrett to explain this conduct. I infer from this that the unspoken reason was an unlawful one. Even more importantly, Respondent LLI never offered a direct, persuasive explanation at the trial or even in its brief as to why it extended Barrett's probationary period. Instead, it simply points to mistakes Barrett made and then notes that his probationary period was extended. Indeed, Murphy, the supervisor who told Barrett of the extension, never testified at the trial. While there are passing references in some documents as to why Barrett's probationary period was extended, none rise to the level of a direct, persuasive explanation. I have noted above that Barrett's performance during his probationary period was not perfect; however, I will not attempt to ascertain which, if any, of those errors Respondent LLI relied upon when Respondent LLI itself has failed to do so. Indeed, absent explanation by Respondent LLI Barrett's errors appear to be typical of those committed by an employee in the process of learning a job. Finally, while I note that there is evidence that Respondent LLI has extended the probationary period of other employees, that is insufficient to establish a basis for showing that it would have done so for Barrett absent his union activities. I conclude that Respondent LLI has failed to meet its burden to show that it would have extended the probationary period of Barrett even absent his union activities. In light of the General Counsel's strong case, I conclude Respondent LLI violated Section 8(a)(3) and (1) of the Act by extending Barrett's probationary period.

I turn now to examine the legality of Barrett's discharge. The elements of the General Counsel's case described above also apply here. Based thereon, I conclude that the General Counsel has met his initial burden.

In examining Respondent LLI's case, I note much of it is premised on the acceptance of the fact that Barrett should properly be considered a probationary employee. Since I have found otherwise, Respondent LLI's argument in this regard must also fail. In any event, the evidence shows that the errors committed by Barrett and relied upon by Respondent LLI as justification for his discharge are not different in kind or number from errors Respondent LLI has tolerated in other employees without discharging them. Since Respondent LLI has failed to show that it would have discharged Barrett absent his union activities, I conclude it violated Section 8(a)(3) and (1) of the Act by discharging Barrett.

c. *Barker's case*

The evidence shows that Barker was one of the main union adherents at the facility. He was interrogated about his union activities by both Murphy and Mitts, and he confirmed to them that he was engaging in such activity. Barker was singled out by Murphy as a leading union adherent shortly before Barker's discharge in a context where Murphy made unlawful threats to reduce employee benefits if the employees selected the Union. This all occurred in the backdrop of Respondent LLI's pattern of unlawful conduct more fully described above. It is thus clear that the General Counsel has again made a strong evidentiary showing in support of the allegation that Barker was unlawfully discharged.

Turning to Respondent LLI's case, I conclude that it has failed to show that Barker would have been discharged even absent his union activity. As to the incident when Barker reported to work drunk, that conduct is not to be taken lightly. However, the evidence shows that such misconduct was not repeated and that Barker underwent treatment that was satisfactory at the time to Murphy. Respondent LLI's attempt to resurrect this as a reason for discharge actually undermines its case. I further note in this regard that Murphy first raised this issue again only after Barker had engaged in union activity, and even then in a conversation that reminded Barker how understanding Respondent LLI had been about this matter and how it was disappointed that Barker would be a union supporter. As to the incident involving the erroneous shipment, here too there is no doubt that Barker erred, both by misloading the merchandise and thereafter failing to

promptly advise his supervisor of the error. Respondent attempts to argue that Barker deliberately attempted to cover up his mistake by keeping it from his superiors, thereby making it more serious than a common mistake in judgment. I reject that contention; it is not supported by credible evidence. I note that even in Respondent LLI's early reports on this incident, the supervisors involved give no hint of a deliberate cover up by Barker. I conclude that this was fabricated to justify Respondent LLI's discharge of Barker. Finally, comparing the severity of the error committed by Barker to the severity of errors of other employees who were not discharged, it is obvious that Respondent has not established that it would have discharged Barker even in the absence of his union activity. Indeed, by comparison, Barker seems to have a better work record than many employees who have been retained. Gillespie's attempt at the hearing to distinguish the record of those employees from Barker's was thoroughly unconvincing. I therefore conclude that Respondent LLI violated Section 8(a)(3) and (1) of the Act by discharging Barker.

D. *The Joint Employer Issue*

The General Counsel argues that Respondent EMS is a joint employer, with Respondent LLI, of the employees employed in the warehouse. Respondents contend that only Respondent LLI is the employer. Except for the arm's length business interaction, the two businesses are totally unrelated. Respondent EMS does not have an employee or supervisor located at the warehouse.

Respondent EMS provides payroll and human resources services to Respondent LLI. As such, Respondent EMS employees handle matters such as insurance claims, unemployment compensation, workers compensation, paycheck deductions such as garnishments and child support payments, and other similar items. Respondent LLI does its own interviewing and hiring of new employees. Respondent EMS plays no part in that process; it merely receives the completed paperwork from Respondent LLI. Likewise Respondent LLI makes all the decisions concerning the operation of the warehouse, salaries and wages, standards of conduct, and discipline. Respondent EMS may only advise Respondent LLI whether the conduct is consistent with law and company policy, but the decision remains with Respondent LLI. Also, regarding matters of safety, Respondent EMS conducts inspections and makes recommendations, but the final decision remains with Respondent LLI.

Respondent EMS assisted in the development of an employee handbook. In that regard it gathered information from Respondent LLI concerning the level of benefits and company policy and it added matters of a legal nature such as ADA. It then submitted the handbook to Respondent LLI for its review and approval. The handbook was then distributed to employees. The cover page bears the name ''LeSaint Logistics'' and ''EMS Employee Management Services.'' The handbook advises employees that EMS assists businesses like LLI ''by assuming the responsibilities and liabilities of employment'' and that EMS has contracted with LLI ''to become your legal employer of record.'' After describing the services EMS will provide to employees, the handbook welcomes the employees to the EMS/LLI ''team.'' The handbook provides that EMS/LLI retain the right to change the handbook. At other points in the handbook EMS is described as an equal opportunity employer, as not tolerating sexual harassment, etc. Employees are advised that they may contact the EMS Human Resources Department directly under certain circumstances, and that EMS will conduct an investigation of the matter. In general, however, the handbook refers to employees as being employed by EMS/LLI.

Employees were issued identification cards which bear the name ''EMS '' in large bold print and ''Employee Management Services'' in fine print; there is no mention of LLI. The card indicates that ''EMS is a Professional Employer Organization (PEO) employing this card holder. We assume administrative responsibilities (i.e., unemployment, workers' compensation payroll administration, etc.).'' Employees are paid with EMS checks.

The Respondents are parties to a contract entered into on January 9. That contract provides that the employees employed by Respondent LLI shall become the employees of Respondent EMS, which shall then lease the employees back to Respondent LLI. The purpose of the agreement is described as shifting the employment of LLI's employees to EMS, thereby reducing administrative costs, and that ''it is the intention of the parties that EMS shall serve as the employer of the leased employees as necessary to achieve administrative efficiency and cost control. The leased employees shall be assigned to [LLI] and EMS shall have no operational control of the leased employees and shall not participate in the assignment of jobs or tasks to leased employees or in the development and implementation of standards of conduct, productivity, or operational procedures.'' The agreement further provides that ''all leased employees shall, in the context of the jobs, duties, and tasks to be performed . . . be under the exclusive control of [LLI]. Leased employees shall receive instructions relative to the performance of such jobs, duties, and tasks, only from [LLI] and its officers, managers and employees.'' Under the terms of the contract, EMS is obligated to ''hire and employ'' LLI's employees, but EMS retains the discretion to decline to hire and employ an individual designated by LLI for employment, in which event EMS must provide written notification and a brief explanation to LLI. Likewise, LLI may, in writing decline to use employees assigned to it by EMS; in doing so however, LLI agrees to abide by applicable federal and state employment laws. EMS is obligated to ascertain all immigration documentation, administer the payroll based upon LLI's report of the hours worked, complete all tax withholding and payroll taxes, provide workers' compensation coverage, and jointly with LLI, be responsible for maintaining appropriate employment documentation at the worksite. LLI is obligated to comply, at its expense, with all workplace safety regulations, provide EMS with written reports of employee injuries, cooperate with EMS in workers' compensation matters and comply with various employment statutes. The contract specifies that LLI ''shall be responsible for the development of standards of performance, operating procedures, rules and regulations related to job performance, and an employee handbook for the leased employees and EMS will have responsibility to compile the materials provided by [LLI] for the employee handbook and to distribute the handbook to the leased employees.'' It is LLI's obligation under the contract to assure that the employees it desires to be leased to it are properly trained and licensed, and to maintain necessary records related thereto. In the event of termination of the contract, the

leased employees become employees of LLI and LLI is obligated to fulfill COBRA requirements; exception is made in this regard if LLI is dissolved or the facility where the employees work is closed. EMS retains the right to designate one of the leased employee as its on-site representative. Respondents are both responsible for seeing that employee benefit policies comply with applicable regulation. EMS and LLI agree to hold each other harmless for costs, damages, etc. in certain specified circumstances. Finally, the agreement specifies the fees that LLI will pay EMS for its services.

Respondent EMS is not involved in the initial decision to discipline employees. However, it does, on occasion, review discipline proposed by Respondent LLI to ascertain whether the discipline is consistent with law and the handbook. Respondent EMS did so in the cases of Barker and Barrett. This review included an examination of the various incident reports described above involving the two employees.[13] Prior to this review, Murphy had called Respondent EMS and explained the ''situation'' and asked for advice. He was advised to send Respondent EMS the pertinent documents so that it could review them directly. An agent of Respondent EMS signed Barker's letter of discharge, together with two agents of Respondent LLI; this is on Respondent EMS letterhead.

Employee Barrett received the identification card described above and thereafter had no contact with Respondent EMS. Employee Rupp was asked by the General Counsel what he knew about Respondent EMS; he replied ''Not much.'' He explained that at some point he was asked to sign a booklet but otherwise he had no contact with anyone from Respondent EMS. Employee Barker was likewise asked what he knew about Respondent EMS, and he explained that he was told by Respondent LLI that Respondent EMS would be handling the paperwork and that Respondent LLI would ''take care'' of the warehouse. The only change he testified about was the change of the name on his paycheck.

A joint employer relationship is established when otherwise independent businesses share or codetermine matters governing significant and essential terms and conditions of employment of a group of employees. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). Joint employers may be jointly liable for the commission and remedy of unfair labor practices committed concerning the employees they jointly employ. *Capitol EMI Music*, 311 NLRB 997 (1993). Neither party has directed me to a case that is sufficiently factually similar to this case so as to be dispositive of the issue, nor have I found such a case. Based on the general principles applicable to this issue, I conclude that the evidence is insufficient to establish a joint employer relationship. It is clear, as I have found above, that Respondent EMS plays no part in the day-to-day operation of the warehouse. Indeed, it has no representative present at the site. Nor does it play any in the development of the terms and conditions of employment of the employees; that is done exclusively by Respondent LLI. Respondent EMS's role with regard to discipline of employees is purely advisory; it neither initiates discipline nor does it have the finally authority to issue discipline.

Admittedly, certain factors, viewed in isolation, tend to support a joint employer relationship. Thus, Respondent EMS to some extent holds itself out as an employer or joint employer of the employees. However, in context it seems clear that Respondent EMS is an employer only in an administrative sense. Importantly, from the employees' perspective, it seems that they understood this to be the case and they had little if any contact with Respondent EMS. Likewise, while it is clear that under the contractual relationship between Respondents the employees became employees of Respondent EMS, they were immediately leased back to the sole and exclusive control of Respondent LLI. The fact that employees were referred to contact Respondent EMS regarding certain payroll related matters is entirely consistent with the notion that Respondent EMS provided payroll services for Respondent LLI; this does not weigh heavily in favor of finding a joint employer relationship. Under all the circumstances, I cannot conclude that Respondent EMS shares or codetermines matters governing significant and essential terms and conditions of employment of the warehouse employees.

The General Counsel, in her brief, appears to suggest that even if I conclude that Respondent EMS is not a joint employer, it may be held liable for the discharges of Barrett and Barker under the holding in *EMI*, supra. I disagree. That case explicitly holds that first the General Counsel must establish a joint employer relationship before any burden shifts. Nor is there any allegation or any substantial evidence that Respondent EMS on its own deliberately requested or caused the discharge of the employees for unlawful reasons. Accordingly, I shall dismiss that portion of the complaint as I pertains to Respondent EMS.[14]

CONCLUSIONS OF LAW

1. Respondent LLI is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent EMS is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. Respondent EMS is not a joint employer of the employees employed by Respondent LLI.

5. Respondent LLI has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Interrogating employees concerning their own sympathies for and activities on behalf of the Union and the sympathies for and activities on behalf of the Union of other employees.

[13] Respondent's human resources manager, Karen Donahue, gave testimony on this issue. At one point in her testimony she stated that in two cases—Barker and Barrett—Respondent EMS received the incident reports from Respondent LLI. Thereafter, in response to leading questions, Donahue testified that she believed that Respondent EMS received no documents from Respondent LLI concerning the discharge of Barrett. I credit the former testimony; the latter version was in response to leading questions and was equivocal.

[14] I note that the record shows that Respondent EMS played no role, other than an administrative one, in the granting of the unlawful wage increase described above. However, Respondent EMS did play a role in developing and distributing the handbook which contains the unlawful rule, more fully described above. I have considered whether this role is sufficient to enter appropriate findings against Respondent EMS even absent the joint employer relationship. I conclude, however, that such findings are unnecessary since the Order and remedy against Respondent LLI will fully remedy the unfair labor practice.

(b) Threatening employees with plant closure if they selected the Union as their collective-bargaining representative.

(c) Threatening employees with a pay cut and loss of benefits if they selected the Union as their collective-bargaining representative.

(d) Telling employees that it would be futile for them to select the Union as their collective-bargaining representative.

(e) Threatening employees with unspecified reprisals because they supported the Union and/or engaged in activities on behalf of the Union.

(f) Threatening employees with discharge if they selected the Union as their collective-bargaining representative and engaged in a strike.

(g) Threatening an employee unless, and/or promising a benefit to an employee if, the employee provided the names of employees involved in the Union's organizational campaign.

(h) Threatening an employee with bodily harm because it believed that the employee was engaging in union activity.

(i) Threatening an employee that there would be no reinstatement for discharged employees because the employees supported the Union.

(j) Granting a wage increase to employees in order to discourage employees from joining or assisting the Union.

6. Respondent LLI has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act by maintaining a rule which prohibits employees from discussing wages with other employees.

7. Respondent LLI has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by:

(a) Extending the probationary period of, and thereafter discharging, employee Charles R. Barrett because he engaged in union activity.

(b) Discharging employee Michael A. Barker because he engaged in union activity.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent EMS has not committed any unfair labor practices.

REMEDY

Having found that Respondent LLI has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent LLI violated Section 8(a)(1) of the Act by maintaining a rule prohibiting the discussion of wages. Although the Respondent LLI contended that the rule was rescinded prior to the hearing, they did not present evidence to prove the assertion. Accordingly, I shall order Respondent LLI to remove the rule from its rulebook.

I have found that Respondent LLI discriminatorily discharged employees Barker and Barrett. I shall order that Respondent LLI offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because of the Respondent LLI's widespread and serious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent LLI to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). I have already noted the extensive 8(a)(1) violations that Respondent LLI has admitted. Those violations are varied in nature, repetitive and severe. They include especially both threats of reprisals and promises of benefits designed to thwart the employees in the exercise of their rights guaranteed by Section 7 of the Act. These violations were committed over a period of several months by various officials, including the highest ranking official of Respondent LLI at the facility. In addition, Respondent LLI unlawfully granted employees a wage increase in an effort to stifle the employees support for the Union. Since the Board will not require that the wage increase be rescinded, it is likely that employees will long remember the unlawful conduct. Also, I have found that Respondent LLI unlawfully discharged two employees in quick succession. Finally, I note that there is no evidence that Respondent LLI has voluntarily taken steps to assure employees that such unlawful conduct will not be repeated in the future. Under these circumstances I conclude that a broad order is necessary to assure that employee rights will be respected in the future.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, LeSaint Logistics, Inc., Trenton Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their own sympathies for and activities on behalf of the Union and the sympathies for and activities on behalf of the Union of other employees.

(b) Threatening employees with plant closure if they select the Union as their collective-bargaining representative.

(c) Threatening employees with a pay cut and loss of benefits if they select the Union as their collective-bargaining representative.

(d) Telling employees it would be futile for them to select the Union as their collective-bargaining representative.

(e) Threatening employees with unspecified reprisals because they supported the Union and/or engaged in activities on behalf of the Union.

(f) Threatening employees with discharge if they select the Union as their collective-bargaining representative and engaged in a strike.

(g) Threatening employees with reprisals unless, and/or promise benefits to employees if, they provide the names of employees involved in the Union's organizational campaign.

(h) Threatening employees with bodily harm because it believes the employees were engaging in union activity.

(i) Threatening employees that there would be no reinstatement for discharged employees because the employees supported the Union.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(j) In any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(k) Maintaining a rule that prohibits employees from discussing wages with other employees.

(l) Granting wage increases to employees in order to discourage employees from joining or assisting the Union or any other labor organization.

(m) Extending the probationary period of, or discharging, or otherwise discriminating against employees for supporting the Union or any other labor organization.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the probationary status of employee Charles R. Barrett and offer Charles R. Barrett and employee Michael A. Barker full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Charles A. Barrett and Michael A. Barker whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Charles A. Barrett and Michael A. Barker and the unlawful extension of the probationary period of Charles A. Barrett and, within 3 days thereafter, notify them in writing that this has been done and that the discharges and extension of the probationary period will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Trenton Ohio copies of the attached notice marked ''Appendix.''[16] Copies of the notices, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 4, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents has taken to comply.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''